BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CATHY L. HILDRETH	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,198
ROSSVILLE VALLEY MANOR	)	
Respondent	)	
AND	)	
	)	
KANSAS HEALTH CARE ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by then Assistant Director Brad E. Avery on July 14, 1998. The Appeals Board heard oral argument February 24, 1999.

APPEARANCES

Chris R. Davis of Topeka, Kansas, appeared on behalf of claimant. Kip A. Kubin of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The only issue on appeal is the nature and extent of claimant's disability. The Assistant Director awarded benefits for a 67 percent work disability based on a 34 percent task loss and a 100 percent wage loss. Respondent disputes the findings on both the task loss and the wage loss components of work disability. As to the task loss, respondent contends the Assistant Director failed to consider a medical opinion by the treating physician that claimant has no restrictions. Respondent also contends the evidence does not show whether the restrictions used to arrive at the task loss include restrictions for claimant's preexisting carpal tunnel or only the trigger finger injuries involved here. Finally, respondent contends the task loss opinion provided by Dr. Peter V. Bieri, the only task loss

opinion in evidence, is fatally flawed because it is not based on the actual tasks claimant performed. As to the wage loss, respondent contends claimant failed to make a good faith effort to find employment and should be limited to functional impairment because she has the ability to earn a wage which is at least 90 percent of her preinjury wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. The Board finds, for the reasons stated below, claimant should received a work disability of 50 percent until the date she began working for Taco Bell. Theoretically, claimant would be entitled to a 14.5 percent work disability during the period of employment and a 7 percent disability based on functional impairment thereafter. However, the payments paid during the period claimant was entitled to a 50 percent disability exceed the amounts owed for either a 14.5 percent or a 7 percent disability. Therefore, nothing further would be owed by respondent once the disability is reduced.

Findings of Fact

1. On January 27, 1996, claimant suffered injury to both thumbs in a struggle with a patient.

2. Claimant treated initially with Dr. Cox. Dr. Cox recommended light duty restrictions and as of February 6, 1996, respondent advised claimant they did not have work for her.

3. Claimant began treating with Dr. Richard E. Polly in May 1996. Dr. Polly first saw claimant May 6, 1996, for trigger thumb on the left. He also identified a preexisting carpal tunnel syndrome not related to this injury. Dr. Polly recommended and eventually performed a surgical release. He later diagnosed and performed surgery for trigger thumb on the right. He rated the impairment as 5 percent to each upper extremity but testified this could be 0 percent. He believed he was giving her the benefit of the doubt. He did not recommend restrictions for the trigger thumbs.

4. Claimant's injury was also evaluated by Dr. Peter V. Bieri. Dr. Bieri noted a preexisting carpal tunnel syndrome which he also found had nothing to do with the work injury. He rated claimant's impairment as 9 percent to the right upper extremity and 7 percent to the left upper extremity, for a combined rating of 9 percent of the whole person. He testified his rating was exclusive of the carpal tunnel syndrome. He testified about work restrictions:

> It was my conclusion based on the anatomic sites of injury and degree of permanent impairment that the claimant met the physical demand letter [*sic*] defined as light regarding the upper extremities. This would limit occasionally [*sic*] lifting to 20 pounds, frequent lifting not to exceed ten pounds and negligible constant lifting. Handling and fingering as defined should be performed no more than frequently

> within the weights prescribed. *(Emphasis added, Regular Hearing, October 13, 1997, at p. 12.)*

5. Dr. Bieri reviewed a list of jobs the claimant had done in the fifteen years before the accident. He testified he had broken these down into job duties based on the DOT guidelines. Dr. Bieri then calculated loss of ability to perform tasks based on the length of time claimant had held each job. Using this method, he concluded claimant has a 34 percent loss of ability to perform tasks.

6. The Board finds Dr. Bieri's opinion about appropriate restrictions more credible than Dr. Polly's indication that claimant does not need restrictions. The Board also concludes those restrictions were intended for the trigger thumbs, not carpal tunnel. This conclusion is based on the fact Dr. Bieri expressly excluded the carpal tunnel from his functional impairment rating, indicating his awareness that the injury he was expected to address was the trigger thumbs only. In addition, his opinion about the restrictions refers to the "anatomic sites of injury." It seems clear in context he knew the sites of injury at issue were the trigger thumbs.

7. Immediately after respondent advised it would not take claimant back to work, claimant began looking for other work. She applied first with employers in Rossville and then Topeka. She did not find work and, after her second surgery, she and her daughter started a diner business in Emmett. She made no money in the diner business. Her daughter was in a serious auto accident on September 27, 1997, and claimant closed the diner business two weeks later. Approximately one month after closing the diner, claimant accepted part-time employment with Taco Bell. She worked there from November 25, 1997, until December 27, 1997. At Taco Bell, she worked from 12 to 30 hours per week at $5.25 per hour. The record indicates that from the time claimant left work for Taco Bell to the regular hearing on February 2, 1998, continued by deposition on February 24, 1998, claimant had not looked for other employment.

8. Based on the testimony of Mr. Richard W. Santner, vocational counselor, the Board finds claimant should be able to earn at least $210 per week.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial

> gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

4. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

5. The Board concludes the task loss opinion by Dr. Bieri does not satisfy the statutory requirements because it was not based on the tasks claimant performed. Dr. Bieri testified he identified tasks from the DOT listings for the jobs claimant performed. This method would give tasks typically performed in those jobs but does not establish that claimant performed those tasks. The task loss component of work disability should be based on the tasks claimant actually performed. Since the record does not establish what those tasks were, the Board concludes Dr. Bieri's opinion should not be considered.

6. The Board concludes claimant did make a good faith effort to find employment through the period of her employment at Taco Bell but not thereafter. Therefore, she would be entitled to a wage loss of 100 percent until she went to work for Taco Bell, the actual wage earned at Taco Bell would be used during the period of employment at Taco Bell, and a wage should be imputed to claimant after her employment at Taco Bell.

7. The Board concludes claimant is entitled to a work disability of 50 percent up to the date she began working for Taco Bell. The record establishes claimant would have a task loss based on Dr. Bieri's restrictions but, because of the failure of Dr. Bieri's task opinion, the record does not establish the amount of the task loss. Since claimant has not met her burden, a 0 percent task loss should be assigned. But this does not preclude work disability using the wage loss. In this case, the wage loss was 100 percent until claimant went to work for Taco Bell. The average of the 0 percent task loss and the 100 percent wage loss yields the 50 percent work disability.

Claimant would be entitled to benefits for a 50 percent disability from the date of accident to November 25, 1997, when she went to work for Taco Bell, a period of 95.14 weeks, less the 13.72 weeks of temporary total disability paid, at the rate of $148.70.

The record does not establish the precise wage while working at Taco Bell, only that the hourly wage was $5.25 and that she worked between 12 and 30 hours per week. The Board concludes, since it is claimant's burden, the 30 hours must be used to give a wage of $157.50, or a 29 percent loss. Averaged with the 0 percent task loss, the work disability would be 14.5 percent. However, respondent would have already paid for more than a 14.5 percent disability before claimant began working at Taco Bell.[1]

The Board finds a wage of $210 per week should be imputed to claimant after she left Taco Bell. This conclusion is based on testimony of Mr. Santner regarding her ability. Since $210 per week is more than 90 percent of claimant's preinjury wage of $223.04, claimant would be limited to functional impairment from that date forward. The parties have stipulated to 7 percent functional impairment. As with the reduced work disability during the period of employment at Taco Bell, the 7 percent disability based on functional impairment would have already been paid and respondent would owe nothing more at that time. Benefits would cease.[2]

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by then Assistant Director Brad E. Avery on July 14, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Cathy L. Hildreth, and against the respondent, Rossville Valley Manor, and its insurance carrier, Kansas Health Care Association, for an accidental injury which occurred January 27, 1996, and based upon an average weekly wage of $223.04, for 13.72 weeks of temporary total disability compensation at the rate of $148.70 per week, or $2,040.16, followed by 81.42 weeks at the rate of $148.70 per week, or $12,107.15, for a 50% permanent partial

---

[1] A 14.5 percent disability would entitle claimant to slightly more than 60 weeks of benefits. Since there are 95.14 weeks from the date of accident, respondent would have already paid 81.42 weeks of permanent disability, 95.14 weeks from the date of accident until claimant began at Taco Bell less the 13.72 weeks which were for temporary total disability. Respondent would be credited with the weeks paid, and nothing further would be owed if the disability was only the 14.5 percent.

[2] A 7 percent disability would entitle claimant to 29.05 weeks. Respondent would have already paid 81.42 weeks, again 95.14 less the temporary total of 13.72 weeks. Therefore, nothing would be owed to pay a 7 percent disability.

disability for the period from the date of accident through November 24, 1997, making a total award of $14,147.31.

The disability is reduced as of November 25, 1997, as explained above. Since the benefits paid through November 24, 1997, exceed the amount owed for the reduced percentage of disability, respondent owes no additional benefit after November 24, 1997.

The full amount of the total award of $14,147.31 is presently due and owing in one lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris R. Davis, Topeka, KS
Kip A. Kubin, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director